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April 19, 2011

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From: William T Fujioka
Chief Executive Officer

SACRAMENTO UPDATE

This memorandum contains two pursuits of County position on legislation related to inverse condemnation and energy efficiency, and a status update on two County-advocacy bills related to public works contracts and polystyrene food containers.

Pursuit of County Position on Legislation

AB 328 (Smyth), as introduced on February 10, 2011, would apply the doctrine of comparative fault and existing rules governing a party's ability to recover post-offer costs to inverse condemnation actions.

Inverse condemnation is a legal term which refers to the cause of action based on the California Constitution that arises when a public use results in a taking or damaging of private property. A taking may arise from the loss of use of private property as a proximate result of a public project. The comparative fault doctrine requires the trier of fact to apportion the damages between the plaintiff and the defendant(s) based upon their respective fault if the plaintiff's negligence contributed to his or her own damages.

Existing law prohibits the government from taking or damaging private property for a public use without the payment of just compensation and permits a person to file an action in inverse condemnation for obtaining compensation for the taking or damage. In typical tort actions, recoverable damages are reduced in direct proportion to the

plaintiff's percentage of fault. However, the law does not treat inverse condemnation actions in the manner as tort actions and, therefore, the comparative fault doctrine does apply to inverse condemnation actions, except in certain actions relating to damages caused by surface water.

According to County Counsel, California appellate courts have applied what is tantamount to a strict liability standard with no apportionment for fault in non-flooding inverse condemnation actions. The appellate courts have carved out a different standard for certain flooding cases which requires the trial court to consider a long list of factors, including the plaintiff's actions or omissions to act that proximately caused or contributed to the harm. The prevailing plaintiff in a non-flooding inverse condemnation action could potentially recover all of his/her damages from the defendant agency despite having contributed to his/her own damages.

In addition, under Code of Civil Procedure section 998, a defendant may make a written offer to settle. If the plaintiff rejects the offer and fails to obtain a more favorable judgment, section 998 prevents the plaintiff from recovering post-offer costs, requires him/her to pay the defendant's post-offer costs, and at the discretion of the Court, may be required to pay the defendant's post-offer expert witness costs. California appellate courts have held that Section 998 only applies to an inverse condemnation action when the plaintiff rejects the defendant's written offer and the trial results in a defense verdict.

Specifically, AB 328 would: 1) apply the doctrine of comparative fault to inverse condemnation actions; 2) require the trier of fact to reduce the compensation to be paid to a plaintiff in direct proportion to their percentage of fault, if any, with respect to the damaging or taking of their property; and 3) extend Code of Civil Procedure section 998 to inverse condemnation actions.

The Department of Public Works (DPW) indicates that existing law generally does not apply the doctrine of comparative fault to inverse condemnation actions. Whereas plaintiffs in tort actions are generally held responsible for their portion of the damage, the public entity in an inverse condemnation action must foot the entire cost, even if the plaintiff was responsible for a portion of the damage. DPW states that applying the doctrine of comparative fault to inverse condemnation actions would lead to significant savings by reducing public agency liability for damages proximately caused by plaintiffs in proportion to their percentage of fault.

Under AB 328, property owners would no longer be able to seek 100 percent reimbursement for property damage to which they contributed. DPW states this would significantly reduce litigation costs to the sewer maintenance districts, the flood control district, and property management operations because DPW would be able to negotiate

more favorable settlement terms inasmuch as the claimant's percentage of fault would reduce the amount potentially recoverable.

In addition, AB 328 would incentivize plaintiffs to seriously consider section 998 offers made by the public agency even in cases which liability is clear and the amount of damages is the primary point of contention. In such cases, DPW states that plaintiffs would have to seriously consider the consequences of rejecting a public agency's section 998 offer because they could be held responsible for the public agency's post-offer costs and possibly the public agency's post-offer expert witness costs. This should reduce the number of cases that proceed to trial and increase the number of cases that settle earlier in the litigation, and result in a savings of litigation costs and attorneys' fees for the County and special districts. County Counsel has reviewed AB 328 and concurs with DPW's assessment.

The Department of Public Works, County Counsel, and this office support AB 328. Support is consistent with the County's Strategic Plan Goal of operational effectiveness and fiscal sustainability to maximize the effectiveness of the County's processes, structure, and operations to support timely delivery of customer-oriented and efficient public services. It is also consistent with general legal exposure reduction goals established by the Board to reduce litigation costs. **Therefore, the Sacramento advocates will support AB 328.**

AB 328 is sponsored by the Los Angeles City Attorney's Office. Opposition is unknown. This measure passed the Assembly Floor by a vote of 76 to 0 on March 29, 2011, and is currently at the Senate Desk awaiting referral to a policy committee.

AB 1124 (Skinner), as amended on April 7, 2011, would state legislative intent to qualify low-income households for financial assistance under the Low-Income Energy Efficiency (LIEE) Program for repairs or replacements of furnaces or water heating systems for a multifamily building.

Existing law authorizes the Public Utilities Commission (PUC) to establish programs to provide financial assistance for energy efficiency improvements. Pursuant to this authorization, the PUC established the LIEE Program to pay for the cost of energy efficiency improvements for low-income households. However, decisions issued by the PUC held that repairs or replacements of furnaces or water heating systems for a multifamily building occupied by low-income households do not qualify for financial assistance under the LIEE Program.

Specifically, AB 1124 would require the PUC to ensure that low-income multifamily rental apartment buildings, as defined, receive energy efficient furnaces, water heating

systems, and energy efficiency measures in common areas as recommended by an energy audit pursuant to the LIEE Program, a successor program, or other energy efficiency program under the PUC's jurisdiction. AB 1124 would require the PUC to modify the decision that determined that only minor repairs and adjustments could be made to furnaces and water heaters under the LIEE Program for increasing energy efficiency in multifamily rental apartment buildings and require the LIEE Program to take specific measures to market the program to low-income multifamily rental apartment building residents and building owners.

For funding eligibility, AB 1124 defines a "low-income multifamily rental apartment building" as a building that meets all of the following requirements: 1) a building with five or more dwelling units; 2) at least 66 percent of the total dwelling units are occupied by households with incomes below 200 percent of the Federal poverty level; and 3) a deed restriction or affordability covenant held by a Federal, state, or local governmental entity that ensures that the percentage of households with incomes below 200 percent of the poverty level will be available at an affordable rent for a period of at least 15 years following the installation of the energy efficiency improvement.

The Community Development Commission (CDC) indicates that AB 1124 would facilitate a greater opportunity for City of Industry funds to be leveraged by affordable housing developers eligible to apply to the CDC's Sustainable Rehabilitation Program. The CDC's program already allows for the repair and/or replacement of furnaces or water heating systems. If AB 1124 passes, a developer would be able to use the LIEE Program to replace furnaces and/or water heating systems and use the more limited City of Industry funds for additional energy efficiency improvements for low-income multifamily projects eligible under their program. This would permit the CDC to use its limited funds to assist more low-income multifamily projects. The CDC states that permitting the repair or replacement of furnaces and/or water heating systems with LIEE Program funds is consistent with the "whole building" approach to energy conservation used by the CDC's Sustainable Rehabilitation Program and promoted by the Environmental Protection Agency. Whole building approaches are cost effective and allow for increased energy and financial savings.

The Internal Services Department (ISD) indicates that heating and hot water are key energy savings measures in low-income, multi-family units and that AB 1124 would fix a gap where the PUC did not previously allow heating and hot water system improvements for multifamily low-income residential properties through the LIEE programs. ISD notes that LIEE programs are exempted from the legislative reductions of natural gas energy efficiency funding.

In addition, ISD indicates that the residential sector in California represents approximately 32 percent of the total electricity usage and 36 percent of the total natural gas consumption. Low-income households consume 27 percent more energy due to the age and condition of their housing units. Since more than one-half of all eligible low-income households live in multifamily rental apartment buildings which are currently ineligible for LIEE funded improvements, ISD indicates that AB 1124 could reduce greenhouse gas emissions significantly.

The Community Development Commission, ISD and this office support AB 1124. Support for AB 1124 is consistent with existing Board policy to support: 1) proposals to assist low-income and elderly households with energy assistance, such as payment subsidies, conservation education, weatherization, and energy efficiency improvements; and 2) proposals that would increase access to funding under the Low-Income Home Energy Assistance Program in Los Angeles County. **Therefore, the Sacramento advocates will support AB 1124.**

AB 1124 is supported by the Consumer Federation of California. Opposition is unknown. This measure is set for a hearing in the Assembly Utilities and Commerce Committee on May 4, 2011.

Status of County-Advocacy Legislation

County-opposed unless amended AB 1354 (Huber), which would prohibit public entities from withholding retention progress payments made to a contractor for the construction of any public work or improvement beginning January 1, 2012, was amended on April 12, 2011.

The April 12, 2011 amendments would: 1) prohibit, from January 1, 2012 until December 31, 2015, public entities from withholding a retention amount greater than 5 percent from progress payments made to a contractor; 2) reduce from ten days to seven days the time period within which a prime contractor or subcontractor must pay any subcontractor after receipt of each progress payment; and 3) require the written notice to enforce a claim upon any payment bond to be given to the surety and the bond principal be given prior to the completion of the project or recordation of a notice of completion.

The Department of Public Works indicates that the department retains 10 percent from each progress payment for contracts that involve the construction of highways, flood control facilities, water and sewer lines, and other infrastructure which is consistent with the retention provisions contained in the Standard Specifications for Public Works

Construction. DPW indicates that this serves as a major incentive for completion and makes collection of liquidated damages easier for public agencies.

The County's current position on AB 1354 is oppose-unless-amended to apply to State agencies only. DPW also recommends an additional amendment to allow up to 10 percent retention for original contracts not exceeding $1 million, $100,000 retention for contracts up to $2 million, and 5 percent retention for contracts over $2 million. Therefore, the Sacramento advocates will continue to oppose AB 1354, unless amended, to also include DPW's additional requested amendments. This measure is set for a hearing in the Assembly Business, Professions and Consumer Protection Committee on April 26, 2011.

County-supported SB 568 (Lowenthal), which would prohibit, beginning January 1, 2013, a food vendor from dispensing prepared food to a customer in a polystyrene foam food container, was amended on April 14, 2011. The amendments extend the date food vendors would be prohibited from dispensing prepared food to a customer in a polystyrene foam food container to January 1, 2014, and gives a food vendor that is a school district until January 1, 2015 to comply with the bill's requirements. This measure is currently pending a vote on the Senate Floor.

We will continue to keep you advised.

WTF:RA
EW:sb

c: All Department Heads
Legislative Strategist
Local 721
Coalition of County Unions
California Contract Cities Association
Independent Cities Association
League of California Cities
City Managers Associations
Buddy Program Participants